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MAY 30 1991

BEFORE THE

Federal Communications Commission

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

WASHINGTON, D.C. 20554

In re Application of)
THE FIDELIO GROUP, INC.)
For A Construction Permit)
Channel 282B (104.3 MHz) New York, NY)

File No. BPH-910502MQ

To: Chief, Mass Media Bureau

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FM EXAMINERS

REQUEST FOR RETURN OF APPLICATION
AS UNACCEPTABLE FOR FILING

GAF Broadcasting Company, Inc. ("GAF"), licensee of WNCN(FM), New York, New York, hereby requests that the above-referenced application filed by The Fidelio Group, Inc. ("Fidelio") be returned as unacceptable for filing. The Fidelio application, if accepted for filing, would be mutually exclusive with GAF's application for renewal of WNCN. As shall be demonstrated below, the Fidelio application must be returned as unacceptable for filing due to untimeliness.

As set forth on its transmittal letter, the Fidelio application was sent by courier for filing on May 2, 1991. It was assigned file number BPH-910502MQ, which indicates that the

application was received on May 2, 1991.^{1/} Moreover, the fee processing form was date stamped to reflect receipt of the Application in Pittsburgh by the Mellon Bank on May 2, 1991. See Attachment 1.

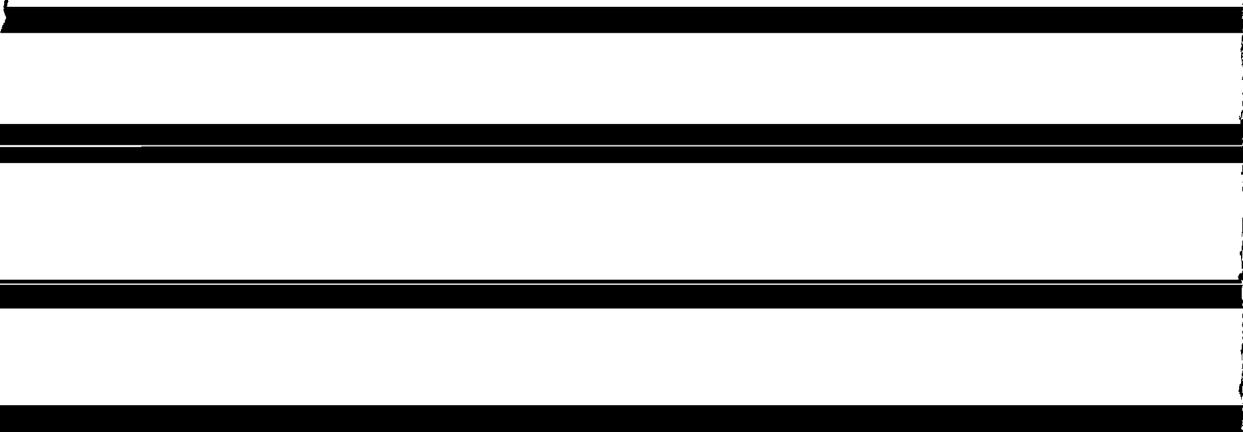
Section 73.3516(e) of the Commission's rules states, in relevant part, as follows:

(e) An application for a construction permit for a new broadcast station . . . will not be accepted for filing if it is mutually exclusive with an application for renewal of license of an existing broadcast station unless it is tendered for filing by the end of the first day of the last full calendar month of the expiring license term.

As set forth in Sec. 73.1020(a)(17) of the Commission's rules, WNCN's current license term expires on June 1, 1991. Thus, any applications mutually exclusive with WNCN's renewal application were due on or before May 1, 1991. Fidelio's application was untimely and cannot be accepted for filing. See, e.g., Spanish Int'l Communications Corp., 63 RR 2d 263 (1987).

The instant situation is clearly distinguishable from Caldwell Television Associates, Ltd., 53 RR 2d 1686 (1983), recon. denied, FCC 83-462 (Oct. 18, 1983). In that case, the

^{1/} According to the "FAIR" report, the Fidelio application was originally assigned file number BPH-910503MQ, which was subsequently changed to BPH-910502MQ. The original file number could have been a typographical error or



applicant delivered its application to a courier service on the day before the cut-off date. The courier was unable to deliver the application for filing on the cut-off date due to inclement weather conditions. Thus, the Commission found "unusual and compelling circumstances" warranting a waiver of the cut-off rule to accept the application filed one day late. Fidelio, however, failed to even deliver its application to the courier service until the day after the cut-off date. Moreover, the Commission has subsequently overturned Caldwell, and thus now requires strict adherence to its cut-off deadlines. Public

WHEREFORE, it is respectfully submitted that the Fidelio application must be returned as unacceptable for filing.

Respectfully submitted,
GAF BROADCASTING COMPANY, INC.

Handwritten signature of John T. Scott, III in cursive script, written over a horizontal line. The signature includes the name "John T. Scott, III" and a small mark that appears to be "AMH" at the end.

John T. Scott, III

Crowell & Moring
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Handwritten signature of Arthur H. Harding in cursive script, written over a horizontal line.

Aaron I. Fleischman
Arthur H. Harding
Christopher G. Wood

Fleischman and Walsh, P.C.
1400 Sixteenth Street, N.W.
Suite 600
Washington, D.C. 20036

Date: May 30, 1991

Approved by ONE FEDERAL COMMUNICATIONS COMMISSION
 3060-0440
 Expires 12/31/90

ORIGINAL

FEE PROCESSING FORM

FOR
 FCC
 USE
 ONLY

05-08-91 8195641 013

Please read instructions on back of this form before completing it. Section I MUST be completed. If you are applying for concurrent actions which require you to list more than one Fee Type Code, you must also complete Section II. This form must accompany all payments. Only one Fee Processing Form may be submitted per application or filing. Please type or print legibly. All required blocks must be completed or application/filing will be returned without action.

SECTION I

APPLICANT NAME (Last, first, middle Initial)
 The Fidelic Group, Inc.

MAILING ADDRESS (Line 1) (Maximum 35 characters - refer to Instruction (2) on reverse of form)
 c/o Mace J. Rosenstein, Hogan & Hartson

MAILING ADDRESS (Line 2) (if required) (Maximum 35 characters)
 555-13th Street, NW

CITY
 Washington

STATE OR COUNTRY (if foreign address) ZIP CODE CALL SIGN OR OTHER FCC IDENTIFIER (if applicable)
 DC 20004

FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF THE SECRETARY

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Enter in Column (A) the correct Fee Type Code for the service you are applying for. Fee Type Codes may be found in FCC Fee Filing Guides. Enter in Column (B) the Fee Multiple, if applicable. Enter in Column (C) the result obtained from multiplying the value of the Fee Type Code in Column (A) by the number entered in Column (B), if any.

(A) FEE TYPE CODE	(B) FEE MULTIPLE (if required)	(C) FEE DUE FOR FEE TYPE CODE IN COLUMN (A)	FOR FCC USE ONLY
(1) M T R		\$ 2,030.00	

SECTION II — To be used only when you are requesting concurrent actions which result in a requirement to list more than one Fee Type Code.

(A) FEE TYPE CODE	(B) FEE MULTIPLE (if required)	(C) FEE DUE FOR FEE TYPE CODE IN COLUMN (A)	FOR FCC USE ONLY
(2)		\$	
(3)		\$	
(4)		\$	
(5)		\$	

ADD ALL AMOUNTS SHOWN IN COLUMN C, LINES (1) THROUGH (5), AND ENTER THE TOTAL HERE. THIS AMOUNT SHOULD EQUAL YOUR ENCLOSED REMITTANCE. →

TOTAL AMOUNT REMITTED WITH THIS APPLICATION OR FILING
 \$ 2,030.00

FOR FCC USE ONLY
 2030.00

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 FM EXAMINERS

Declaration of Todd F. Silbergeld

I, Todd F. Silbergeld, hereby declare under penalty of perjury that the following is true and correct:

I am a law student employed as a summer associate at the law firm of Fleischman and Walsh, P.C.

On May 23, 1991, I inspected the files maintained by the Office of the Secretary of the Federal Communications Commission which contain copies of all filings made with the Secretary's Office from May 1, 1991 until May 22, 1991. I inspected every back-up filing made thus far during that month. I did not and could not locate any filing made up to that point during the month of May, 1991 by "The Fidelio Group, Inc."

Additionally, on May 28, 1991, I examined the filings maintained by the Secretary's Office for the month of April, 1991. I was informed by Ms. Ginny Simms of the Office of the Secretary that after the last day of each month only the fee processing form of a back-up filing is retained by that Office. I did not find a fee processing form or FCC Form 155 for The Fidelio Group, Inc. I also re-examined all of the filings made during the month of May, 1991. Again, there was no application filed by The Fidelio Group, Inc.

Executed this 29th day of May, 1991.

May 29, 1991
Date

Todd F. Silbergeld

CERTIFICATE OF SERVICE

I, Elyse Sanchez, secretary with the firm of Fleischman and Walsh, P.C., have caused this 30th day of May, 1991 the attached document to be sent via First Class Mail, postage prepaid, to the following addressees:

Mace J. Rosenstein, Esq.
Hogan & Hartson
Columbia Square
555 Thirteenth Street, N.W.
Washington, D.C. 20004
Counsel for The Fidelio Group, Inc.

Morton L. Berfield, Esq.
Cohen and Berfield, P.C.